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**UNITED STATES DISTRICT COURT
FOR THE
NORTHERN MARIANA ISLANDS**

JUNG SOON LEE, (Deceased) By SUNG YOUNG LEE, Personal Representative,) CIVIL ACTION NO. 05 - 0031
Plaintiff,)
v.) MEMORANDUM OF POINTS AND
DONG GUK CORPORATION, DONGBU) AUTHORITIES IN SUPPORT OF
INSURANCE COMPANY LTD.,) PLAINTIFF'S MOTION FOR LEAVE
Defendants.) TO AMEND FIRST AMENDED
COMPLAINT

Plaintiff Sung Young Lee (hereafter “Plaintiff”) moves this Court, pursuant to Fed.R.Civ.P. 15(a) to amend her Complaint to assert a cause of action against Dong Guk Corporation (hereafter “Defendant”).

MEMORANDUM OF POINTS AND AUTHORITIES

I.

AMENDMENT IS FREELY GRANTED UNDER THESE CIRCUMSTANCES

Under Federal Rules of Civil Procedure 15(a), a party may amend their complaint once “as a matter of course” before a responsive pleading is served, after that the “party may amend the party’s pleading only by leave of court or by written consent of the adverse party and leave shall be freely given when justice so requires.” Fed.R.Civ.P. 15(a). Thus “after a brief

(Memorandum of Points and Authorities)

1 period in which a party may amend as of right," leave to amend lies "within the sound discretion
 2 of the trial court." *United States v. Webb*, 655 F.2d 977, 979 (9th Cir.1981). Thus, "[r]ule 15's
 3 policy of favoring amendments to pleadings should be applied with 'extreme liberality.' " *Webb*,
 4 655 F.2d at 979. And "(t)he Supreme Court has instructed the lower federal courts to heed
 5 carefully the command of Rule 15(a), F.R.Civ.P., by freely granting leave to amend when justice
 6 so requires." *Hurn v. Retirement Fund Trust of Plumbing, Heating*, 648 F.2d 1252 (9th Cir.
 7 1981) (citing *Howey v. United States*, 481 F.2d 1187, 1190 (9th Cir. 1973)).

8 Therefore, when exercising its discretion under Rule 15(a), a court must be guided by the
 9 underlying purpose of the rule, which is to "facilitate the decision on the merits rather than on the
 10 pleadings or technicalities. *Edlidge v. Block*, 832 F.2d 1132, 1135 (9th Cir. 1987). "Generally,
 11 this determination should be performed with all inferences in favor of granting the motion."
 12 *Griggs v. Pace Am. Group, Inc.*, 170 F.3d 877, 880 (9th Circ. 1999) (citing *DCD Program v.*
 13 *Leighton*, 833 F.2d 183, 186 (9th Circ. 1987).)

14 **II.**

15 **LEGAL ANALYSIS**

16 **A. Plaintiff is entitled to amend his First Amended Complaint and include a direct
 17 action based on new evidence learned during discovery.**

18 The propriety of a motion for leave to amend is generally determined by four factors: (1)
 19 undue delay; (2) bad faith; (3) futility of amendment; and (4) prejudice to the opposing party.
 20 *Hurn*, 648 F.2d at 1254. In *Hurn*, the District Court granted Defendant's Motion for Summary
 21 Judgement in that Plaintiff failed to state a claim under section 203 of the Employee Retirement
 22 Income Security Act ("ERISA"). Plaintiff filed a motion for leave to amend his complaint to
 23 state a cause of action under section 302 of the Taft-Hartley Act two years after Plaintiff filed his
 24 original complaint. The Court denied Plaintiff's motion. Plaintiff appealed.
 25

26 The 9th Circuit held that there is no prejudice to Defendant because Defendant should be
 27 fully prepared to litigate the issues because the operative facts remain the same: that Plaintiff
 28 challenges his suspension. *Id* at 1254. The Court further held that the two years time to file the
 amended complaint does not provide sufficient grounds for denying leave to amend. *Id*. The

1 Court ruled that delay alone does not provide sufficient grounds for denying leave to amend. *Id.*
2 The Court furthermore held that Plaintiff's claim is not frivolous in that his 302 claim alleges the
3 Defendant's suspension action to be arbitrary and capricious, therefore, the amendment cannot be
4 considered futile. *Id* at 1255.

5 Applying the four factors above to the case at hand, it is clear that Plaintiff's Motion to
6 Amend the First Amended Complaint poses no undue delay, bad faith, futility of amendment or
7 prejudice to Defendant.

8 **1. There is No Undue Delay**

9 Here, Plaintiff filed his Complaint on or about September 06, 2005. On September 29,
10 Plaintiff filed a stipulated motion to file First Amended Complaint and indeed filed such
11 Complaint. On March 27, 2007, Plaintiff filed this Second Amended Complaint to include a new
12 cause of action based on newly discovered evidence during the Deposition of Defendant in this
13 case. This Second Amended Complaint is about one (1) year and six (6) months from filing the
14 original complaint. There is no undue delay in filing Plaintiff's Second Amended Complaint.

15 Moreover, it has been less than two weeks from the time the new evidence was
16 discovered to the time of the filing for this Motion to Amend Complaint. Certainly, a party could
17 only move to amend when new evidence gives rise. This is precisely what happened here: once
18 the new evidence was discovered, Plaintiff has moved to amend the complaint. Put in another
19 way, Defendant could not be prejudice by operative facts that they were very aware of — a fact
20 that was newly discovered by the Defendant; in actuality, it is Plaintiff who will be prejudiced if
21 this amendment is not granted.

22 **2. There is No Bad Faith**

23 Plaintiff files the Amendment in good faith based on newly discovered evidence. Thus,
24 there is no bad faith in filing such Amendment.

25 **3. Amendment Will Not Be Futile; It Will Give New Remedies to Plaintiff**

26 This amendment will not be futile as it will give Plaintiff a remedy under the Consumer
27 Protection Act to recover for attorney fees. Moreover, this cause of action will deter the
28 Defendant from engaging in illegal acts which harms the consumers; it will further deter

1 Defendant to serve alcoholic beverages, willfully to the community beyond 2:00 a.m.

2 The Consumer Protection Act expressly states that cause of action under Consumer
 3 Protection Act "are cumulative to each other and to the remedies or penalties available under all
 4 other laws of the Commonwealth" and should be read in favor of the consumers. A combined
 5 reading of the Consume Specifically 5 CMC,

6 **§ 5111. Remedies Cumulative.**

7 Unless otherwise expressly provided, the remedies or
 8 penalties provided by this article are cumulative to each other
and to the remedies or penalties available under all other laws
of the Commonwealth.

9
 10 **§ 5123. Construction.**

11 (a) In interpreting this article, the courts of the
 12 Commonwealth shall construe any ambiguity in any provision
 13 of this article, or in any regulation or order issued under this
 14 article, or in any implied or expressed warranty covered by
 15 this article, or any similar ambiguity, in favor of the
16 consumer.

17 (c) Compliance with the requirements of this article shall not
 18 relieve, exempt, or excuse any merchant from any obligation
arising from any legal duty to exercise due care or caution, or
from liability for injury resulting from a breach of such duty,
or in any other manner alter, modify, or diminish the
19 responsibilities of the merchant.

20 (Underline added).

21 It is clear that the Consumer Protection Act clearly favors a liberal interpretation in the
 22 consumer's favor and allows this cause of action to exist; it is also clear that this cause of action
 23 is cumulative and could not be futile as expressly intended by the Legislature. Moreover, the
 24 Consumer Protection Act allows for Plaintiff to recover for attorney fees and costs where the
 25 violation is willful. This is precisely the evidence that was newly discovered.

26 The remedies for attorney fees is generally not available for a negligence cause of action
 27 or under the current causes of action in Plaintiff's First Amended Complaint. Here, the
 28 Consumer Protection Act would allow Plaintiff to recover for reasonable attorney fees and costs
 pursuant to 5 CMC § 5112: "In addition to actual damages, the court shall award liquidated

1 damages in an amount equal to the actual damages in cases of willful violations, and shall award
 2 costs and reasonable attorney's fees if the plaintiff prevails."

3 Accordingly, in light of the Legislature's clear intent that the Consumer Protection Act is
 4 (a) a cumulative remedy, (b) must be read in favor of the consumer, (c) it will deter the
 5 Defendant from engaging in illegal activity and serving alcoholic beverages to consumers beyond
 6 2:00 a.m., and (d) that attorney fees and costs are available remedies. Thus, the amendment will
 7 not be futile but rather extremely necessary to avail the Plaintiff to a remedy that Plaintiff is
 8 entitled to receive.

9

10 **3A. It was Newly Discovered That Defendant Intentionally And Wilfully Served
 11 Alcoholic Beverages After 2:00 a.m. Despite Knowing That It was A
 12 Violation of Commonwealth Law.**

13 Specifically, Plaintiff's Proposed Second Amended Complaint includes new facts of
 14 actual admission by Defendant during discovery that leads to several violations of the CNMI
 15 Consumer Protection Act and 4 CMC § 5554. *See* Section III below. On March 22, 2007, Lee,
 16 Sung Chun ("Sung") (President and shareholder of Dong Guk Corporation) and Mee Yeon Lee
 17 ("Mee") (Vice-President and shareholder of Dong Guk Corporation) were deposed. In his
 18 deposition, Sung admitted the following (*see page 9-10 Exhibit A*):

19 INTERPRETER: He say after 2:00 a.m. he got no choice to serve
 20 some friends from Korean because ah, near to his business
 21 he got lot of restaurant too, but they also serving. If he
 22 doesn't serving the alcohol, whatever they order? And they
 23 will no – he's gonna lose his own customer, so he got no
 24 choice. (Page 9, line 16).

25 Q So, it's ah, important to – in order to make a – to keep the
 26 business and customers, to serve after 2:00 a.m.? (page 10,
 27 line 4)

28 INTERPRETER: Yes. (page 10, line 7)

29 INTERPRETER: He say that ah, some of customer they come
 30 asking after 2:00 o'clock for the alcohol and then he – he
 31 explain first what's the reason why he doesn't wanna serve
 32 the alcohol, because the law is cannot after 2:00 o'clock,
 33 it's very hard for him to sell it, but he lost – he try, he lost a
 34 lot of customer for that, so he got no choice, sometimes he
 35 explain first and then he let go. (page 10, line 9).

In her deposition, Mee admitted the following (page 14-15, see Exhibit B):

Q Ah, did you know that it was illegal to serve alcohol after 2:00 a.m. in 2004?

A Yes.

Q. Ok, and you still serve alcohol sometimes

A Yes.

Qafter 2:00 a.m. in 2004?

A Yes.

Q. And why is it that you know it's illegal and you still serve alcohol after 2:00 a.m. Why?

A Because ...

INTERPRETER: She say that ah, even the near to her restaurant all kind of Korean restaurant? The customers likes to drink and eating – ah, eating, same time order the food and the drink, but if she doesn't offer the – ah serve the alcohol? Maybe gonna be – the customer gonna go to other side, so she's gonna lose the customers. That's ...

Q Did you know – did you believe it was wrong for you to serve after 2:00 a.m.?

A Yes.

Defendant's direct admissions of selling alcoholic beverages to customers passed 2 a.m. is a direct violation of the Consumer Protection Act and 4 CMC § 5554, which gave rise to a valid claim of a direct action. Accordingly, Plaintiff's Second Amended Complaint is not futile.

3B. It Was Newly Discovered That Defendant Discriminated Their Consumers Based on Race.

Defendant further admitted through its Vice President, Mrs. Lee that only Koreans were served after 2:00 a.m.; that Chamorro and Carolinians were not served after 2:00 a.m. The very fact that they illegally served only Koreans is a discrimination not only to Chamorros, Carolinians or other race but also to Koreans, such as Ms. Jung Soon Lee (deceased). The following deposition of Vice President, Mrs. Lee, is as follows:

1 Q And, do you have regular customers that are Chamorros?

2 A Yes, many Chamorro.

3 Q And, you serve them alcohol after 2:00 a.m.?

4 A No.

5 Q So Chamorros you don't serve alcohol after 2:00 a.m.?

6 A No

7 Q And, Koreans, you have regular customer Koreans?

8 A Yes.

9 Q And, you serve them alcohol after 2:00 a.m.?

10 A Yes

11 Q And, Mr. Lee knows that?

12 A Mr. Lee? Sometimes know, sometimes he doesn't know.

13 Q You, ah – and how about Carolinian?

14 A No.

15 Q You don't serve after 2:00 a.m.?

16 A Because Korean, we have same custom and same relationship or same thinking, but I don't know Carolinian and other foreigner? So I cannot tell.

17
18 (Underline added). *See Exhibit C, Mrs. Lee's Deposition, attached hereto and
19 incorporated by reference.*

20 The disparity and discrimination of services based on racial or ethnic differences is a
21 violation of the Consumer Protection Act pursuant to 5 CMC § 5120 which states that "It is an
22 offense for any merchant to discriminate in commerce with any person on the basis of the race,
23 color, creed, religion, sex, age, ethnic background, national origin, citizenship, or place of birth
24 or residence of the person." This newly discovered discrimination is a violation of the Consumer
25 Protection Act and Plaintiff should be allowed to amend the First Amended Complaint.

26
27 **4. There is No Prejudice to the Opposing Party**

28 Defendant is not prejudiced by Plaintiff's Second Amended Complaint to include a

1 violation of the Consumer Protection Act, which is a the new claim of direct action. In
2 Plaintiff's First Amended Complaint, Plaintiff stated that "Defendant's conduct violated 4 CMC
3 § 5554 by serving alcoholic beverages after 2:00 a.m. and by keeping its business operation and
4 its customers after 2:00 a.m. *See page 3 paragraph 13 on Plaintiff's First Amended Complaint.*
5 Defendant's violation was evident when Defendant admitted through discovery that it served
6 alcoholic beverage to customers after 2:00 a.m. Although this new facts give rise to the
7 Consumer Protection Act direct action, the operative facts remain the same as provided on
8 Defendant's Complaint as stated above.

9 More importantly, this willful violation of serving alcohol beyond 2:00 a.m. was known
10 to Defendant — even before this action was initiated. The mere fact that they knew that their
11 action is illegal is significant; it unconditionally shows that they are very well aware (even before
12 the filing of this proposed amendment) of their actions and the potential liability of their
13 conscious decision to violate the law. Defendant could not now say that this cause of action is
14 somehow a "surprise" or would "prejudice" them by this amendment.

15 The new set of factual evidence under the amendment to Plaintiff's Second Amended
16 Complaint constitute a valid and sufficient claim. Accordingly, Plaintiff's motion for leave to
17 amend Plaintiff's Complaint shall be granted. *See Hurn, supra, at 1254 ([W]here there is lack of
18 prejudice to the opposing party and the amended complaint is obviously not frivolous, or made as
19 a dilatory maneuver in bad faith, it is an abuse of discretion to deny such a motion.”).*

20 **III.**

21 **DIRECT CLAIM IS APPROPRIATE**

22 The CNMI law has express authority provision which allows plaintiff to pursue a direct
23 action claim against an individual or company who violated the Consumer Protection Act. The
24 statute provides as follows:

25 **5 CMC § 5105. Unlawful Acts or Practices**

26 The following unfair methods of competition and unfair or
27 deceptive acts or practices in the conduct of any trade or commerce
are hereby declared to be unlawful:

28 . . .

1 (e) Representing that . . . services have ... approval ...that
2 they do not have or that a person has a ... approval ... the person
3 does not have;

4 . . .

5 (l) Engaging in any other conduct which similarly creates a
6 likelihood of confusion or of misunderstanding;

7 (m) Engaging in any act or practice which is unfair or
8 deceptive to the consumer;

9 . . .

10 (r) Introducing into commerce any good or service which
11 the merchant knows or should know is unsafe or which the
12 merchant knows or should know may cause an unsafe condition in
13 normal use, including performing a service which may cause an
14 unsafe condition.

15 Through the discovery conducted during the week of March 22, 2007, it was learned that
16 Defendant knew that it was unlawful to sale alcoholic beverages in its business establishment to
17 customers after 2:00 a.m. *Exhibit A, page 9-10 and Exhibit B, page 14-15*. However, Defendant
18 proceeded to sale alcohol to customers after 2:00 a.m, representing to customers at sometime that
19 it was against the law to sale alcohol after 2:00 a.m. but then sale and serve them anyway. *Id.*
20 and on other times just sale to customers without informing them about the law, thus deceiving
21 customers that it had the authority to sale alcohol passed 2:00 a.m. All these are in violation of
22 the Consumer Protection Act as stated hereinabove.

23 Thus, the attached *Exhibit D ([Proposed] Second Amended Complaint)* indicates
24 Plaintiff's propose to add new paragraphs to the Complaint in order to sate a direct action against
25 Defendant. Naturally, upon being added to the action, Defendant would be entitled to assert any
26 and all defenses asserted by Defendant, as well as any other defenses it may deem appropriate.
27 Plaintiff merely seek leave of the court to assert the claim against Defendant pursuant to the
28 direct action statute.

29 **IV.**

30 **CONCLUSION**

31 Leave to file an amended complaint and to assert direct action is liberally granted. By the
32

1 Proposed amendment, Plaintiff seeks to add a claim against Defendant for violating the
2 Consumer Protection Act. The motion should be granted.

3
4 Respectfully submitted this 2nd day of April, 2007.

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6 TORRES BROTHERS LLC
7 ATTORNEYS AT LAW
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/S/ VINCENT DLG. TORRES
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